

**R.J., Appellant**

**DEPARTMENT OF VETERANS AFFAIRS,  
NORTH TEXAS HEALTH CARE SYSTEM,  
Dallas, TX, Employer**

*Appearances:*

### Case Submitted on the Record

Before:

## JURISDICTION

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated April 7, 2015,<sup>3</sup> the Board found that OWCP had improperly applied the standard for timely reconsideration requests rather than the clear evidence of error standard applicable to untimely reconsideration requests. The Board set aside OWCP's August 19, 2015 decision and remanded the case for OWCP to apply the appropriate standard. The relevant facts of the case are as follows.

On May 24, 2005 appellant, then a 24-year-old medical support assistant, filed an occupational disease claim (Form CA-2) alleging that he developed right cervical disc bulge and right arm pain due to his employment duties. His attending physician, Dr. Douglas S. Won, a Board-certified orthopedic surgeon, found that appellant was totally disabled through May 12, 2005. On July 7, 2005 OWCP accepted his claim for right carpal tunnel syndrome.

OWCP referred appellant for a second opinion evaluation with Dr. Robert M. Chouteau, a Board-certified orthopedic surgeon, on June 29, 2007. In a report dated July 17, 2007, Dr. Chouteau noted that his examination of appellant was normal and that appellant showed no evidence of disability based on the accepted diagnosis of right carpal tunnel. He opined that appellant could return to full duty with no restrictions.

Dr. Washington disagreed with Dr. Chouteau's conclusions on August 16, 2007 and noted that appellant's electrodiagnostic studies supporting his ongoing diagnosis of carpal tunnel syndrome.

Due to the conflict of medical opinion evidence regarding whether appellant's carpal tunnel syndrome was ongoing, OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon on September 6, 2007. In his October 3, 2007 report, Dr. Hood found positive median compression test, positive Phalen's test, and decreased two-point discrimination. He concluded that appellant could return to light-duty work, but recommended a carpal tunnel release and decompression of the right shoulder.

Appellant underwent a right carpal tunnel surgical release on November 16, 2007. Following this surgery, Dr. Washington provided work restrictions. Beginning on January 15, 2009 Dr. Washington no longer provided work restrictions.

On August 3, 2009 OWCP referred appellant for a second opinion evaluation with Dr. Arthur Sarris, a Board-certified orthopedic surgeon. In a report dated August 27, 2009, Dr. Sarris opined that appellant continued to experience residuals and disability due to his accepted right carpal tunnel syndrome. He found that appellant was totally disabled.

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<sup>3</sup> Docket No. 15-1797 (issued April 7, 2016).

Dr. Washington continued to diagnose right carpal tunnel syndrome and indicate that appellant was totally disabled throughout 2009, 2010, and 2011. Appellant's surgeon, Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, also supported appellant's continued carpal tunnel syndrome and disability for work on June 30, 2011.

On September 28, 2011 OWCP again referred appellant for a second opinion report with Dr. Marvin E. Van Hal, a Board-certified orthopedic surgeon, to determine the nature and extent of appellant's disability. In a report dated December 13, 2011, Dr. Van Hal found that Phalen's test and Tinel's sign were negative. He noted that appellant's two-point discrimination was normal. Dr. Van Hal opined that appellant was not disabled from work due to his accepted condition of carpal tunnel syndrome. He found no objective evidence of residuals.

Dr. Washington reviewed Dr. Van Hal's report on February 9 and March 8, 2012 and disagreed with his findings and conclusions. He supported appellant's ongoing disability due to carpal tunnel syndrome.

To resolve the new conflict in medical opinion regarding whether appellant had continuing disability, OWCP selected Dr. Charles Kennedy, a Board-certified orthopedic surgeon, to serve as the impartial medical examiner through an ME023 dated December 3, 2012. There was also a screen capture of his selection. On December 5, 2012 OWCP referred appellant for an impartial medical examination with Dr. Kennedy. In a report dated December 28, 2012, Dr. Kennedy found that appellant was not disabled from work and no longer exhibited right carpal tunnel syndrome. He opined that appellant could return to his regular-duty position.

On March 14, 2013 OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Kennedy's report. No additional evidence was received by OWCP. In an April 24, 2013 decision, it terminated appellant's wage-loss benefits, effective April 7, 2013, based on Dr. Kennedy's report.

Dr. Washington submitted a series of ongoing reports dated December 4, 2013, January 30 and May 8, 2014 which continued to support appellant's diagnosis of right carpal tunnel syndrome and his disability for work. Dr. Washington continued to support appellant's diagnosis of right carpal tunnel syndrome and his disability from work in 2014.

Appellant sought treatment from Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon beginning February 19, 2015. Dr. Shade noted that appellant underwent right shoulder surgery on January 19, 2015. He diagnosed impingement syndrome (right shoulder, surgically treated), cervical radiculopathy C5-6, bilateral carpal tunnel syndrome, and bilateral cubital tunnel syndrome.

OWCP issued a decision dated May 7, 2015 accepting the additional conditions of brachial neuritis or radiculitis, and a right shoulder condition. Appellant submitted a claim for compensation (Form CA-7) requesting wage-loss compensation from April 7, 2013 through May 14, 2015. In a letter dated May 19, 2015, OWCP informed appellant that the additional conditions had been accepted in error and requested that appellant submit a new claim.

Dr. Shade completed an attending physician's report (Form CA-20) on May 13, 2015 and opined that appellant was totally disabled. He diagnosed right carpal tunnel syndrome, brachial neuritis or radiculitis, and condition of the right shoulder. Dr. Shade indicated by checking a box marked "yes" that appellant's conditions were due to his employment. In a separate narrative report, he attributed appellant's diagnosed conditions to his employment duties of eight hours of computer repetitive keying, telephone usage, repetitive motions, inserting data in the computer, simple grasping, and prolonged sitting. Dr. Shade continued to diagnose carpal tunnel syndrome, brachial neuritis, and right shoulder condition.

In a letter dated June 15, 2015, appellant's representative requested a copy of documents showing the bypass and selection process from referee physician Dr. Kennedy. In a letter dated June 16, 2015, OWCP provided this information.

On June 29, 2015 appellant, through his representative, requested reconsideration of the April 24, 2013 termination decision. He argued that Dr. Kennedy had been improperly selected as the impartial medical examiner. In support of this request, the representative submitted Dr. Kennedy's physician profile from the Texas medical board. He also alleged that appellant was allowed less than 30 days to respond to the pretermination notice.

Appellant continued to submit reports from Dr. Shade dated June 18 through July 24, 2015. Dr. Shade listed appellant's diagnosed conditions of right carpal tunnel syndrome, brachial neuritis, and right shoulder impingement. He did not address appellant's disability for work.

On August 19, 2015 OWCP made a payment in the amount of \$2,129.00 for the period April 7 through May 4, 2014 to appellant.

By decision dated August 19, 2015, OWCP denied appellant's request for reconsideration of the merits of his claim.

Appellant appealed to the Board. In its April 7, 2016 decision,<sup>4</sup> the Board found that appellant's request for reconsideration was untimely filed and that OWCP had improperly applied the standard for timely requests for reconsideration. The Board set aside OWCP's August 19, 2015 decision and remanded the case for OWCP to apply the appropriate standard.

In a letter received by OWCP on April 26, 2016, appellant's representative requested a new impartial medical examination. He contended that Dr. Kennedy's selection was inappropriate as his primary address was outside the 25-mile initial selection pool, and his selection should be voided. The representative further asserted that OWCP could not verify how it had selected Dr. Kennedy. He also contended that appellant had not received due process as the notice of proposed termination was issued on March 14, 2013 and his benefits were terminated on April 7, 2013. The representative argued that appellant was entitled to the full 30 days prescribed by statute. Finally, he asserted that as appellant was denied due process and as Dr. Kennedy was not chosen in the manner which supports his impartiality, Dr. Kennedy's report

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<sup>4</sup> *Id.*

was not entitled to special weight and could not meet OWCP's burden of proof to terminate appellant's compensation benefits.

By decision dated May 9, 2016, OWCP denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error. It found that appellant received compensation benefits through May 4, 2013 in a payment dated August 28, 2015. OWCP noted that the notice of proposed termination was issued on March 14, 2013 and the final decision was issued over 30 days later meeting the due process requirement. It determined that Dr. Kennedy had been properly selected as his practice had offices within 30 miles from appellant's home.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>6</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request [the "received date" in the Integrated Federal Employee's Compensation System (iFECS)].<sup>8</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>9</sup>

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether the claimant has demonstrated clear evidence of error.<sup>10</sup> OWCP's procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in its regulations, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>7</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>8</sup> 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016). *G.F.*, Docket No. 15-1053 (September 11, 2015).

<sup>9</sup> *Supra* note 6 at 769; *Jesus D. Sanchez*, *supra* note 7 at 967.

<sup>10</sup> *Supra* note 6 at 770.

<sup>11</sup> *See* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5 (February 2016).

Clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which, on its face, shows that OWCP made a mistake.<sup>12</sup> To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>17</sup> To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>18</sup> The Board must make an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>19</sup>

### ANALYSIS

In the April 7, 2016 decision, the Board found that appellant's June 29, 2015 request for reconsideration was untimely as it had not been received by OWCP within one year of the April 24, 2013 decision terminating his claim. The case was remanded for OWCP to apply the standard for an untimely request for reconsideration. By decision dated May 9, 2016, OWCP reviewed the evidence of record and found that it did not demonstrate clear evidence of error. The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>20</sup>

In support of his request for reconsideration, appellant submitted additional reports from Dr. Washington dated December 4, 2013 through May 8, 2014. These reports continued to support appellant's diagnosis of right carpal tunnel syndrome and his disability for work. The Board notes that clear evidence of error was intended to represent a difficult standard. Even the submission of a detailed, well-reasoned medical report which, if submitted before the denial as

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<sup>12</sup> *Id.*

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>15</sup> *Jesus D. Sanchez*, *supra* note 7 at 968.

<sup>16</sup> *Supra* note 14.

<sup>17</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>18</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>19</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>20</sup> *Id.*

issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.<sup>21</sup> The additional reports of Dr. Washington, while supportive of appellants' claim, fail to demonstrate clear error in the April 24, 2013 decision.

Appellant also submitted medical evidence from Dr. Shade. He diagnosed carpal tunnel syndrome and indicated that appellant's conditions were due to his employment duties of eight hours of computer repetitive keying, telephone usage, repetitive motions, inserting data in the computer, simple grasping, and prolonged sitting. While Dr. Shade supported that appellant had continuing disability due to his accepted condition, his opinion is insufficient to raise a substantial question as to the correctness of OWCP's decision. As noted, clear evidence of error was intended to represent a difficult standard.<sup>22</sup> The Board finds that Dr. Shade's reports do not rise to the level of clear evidence of error.

Appellant's representative argues that OWCP committed procedural errors in terminating appellant's compensation benefits. He asserts that Dr. Kennedy was not properly selected to serve as the impartial medical examiner. The representative further alleges that Dr. Kennedy's office was located too far away from appellant's zip code to be selected as the first appropriate physician. Other than broad allegations, appellant has not provided any substantive evidence of clear evidence of error in the selection of Dr. Kennedy.

Appellant also argues that OWCP violated due process by improperly terminating his compensation benefits less than 30 days after the pretermination notice. OWCP issued its pretermination notice on March 14, 2013. In a decision dated April 24, 2013, OWCP terminated appellant's wage-loss compensation, effective April 7, 2013. OWCP afforded appellant more than 30 days from the pretermination notice until the final decision to respond. This time period is appropriate in accordance with OWCP's regulations.<sup>23</sup> Furthermore, as to appellant's assertion that his constitutional rights to due process were violated, the Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.<sup>24</sup> As the Board and OWCP are administrative bodies, neither has jurisdiction to review a constitutional claim such as that made by appellant.<sup>25</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>21</sup> W.C., Docket No. 16-0991 (issued December 1, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> 20 C.F.R. § 10.540.

<sup>24</sup> See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

<sup>25</sup> S.C., Docket No. 16-1572 (issued January 24, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board